SERVED: May 2, 1994

NTSB Order No. EA-4148

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 13th day of April, 1994

DAVID R. HINSON, Administrator, Federal Aviation Administration, Complainant, v. WAYNE C. NUTSCH, Respondent.	)	Docket SE-12019

OPINION AND ORDER

Respondent has appealed from the oral initial decision of Administrative Law Judge William E. Fowler, Jr., issued on October 29, 1992, following an evidentiary hearing.[1] The law judge affirmed that part of an order of the Administrator citing respondent for violating 14 C.F.R. 91.75(a) and 91.9.[2] Contrary

[1]The initial decision, an excerpt from the hearing transcript, is attached.

[2]§ 91.75(a) (now 91.123) provided, as pertinent:

to the Administrator's order, the law judge determined that the proposed sanction (a 30-day suspension of respondent's airline transport pilot certificate) should be waived, consistent with the Aviation Safety Reporting Program.[3] We deny the appeal.

Respondent, an FAA air safety inspector, was the non-flying pilot in command (PIC) of Cessna Citation N4 that was being operated pursuant to the FAA's currency and proficiency "Hangar Six" program. Respondent was performing radio, navigation, and other non-flying duties, and copilot Thomas Glista, another FAA inspector, was flying the aircraft.

After the aircraft had been issued its IFR[4] flight plan and cleared to 17,000 feet, ATC asked whether N4 would like to deviate around bad weather along the planned flight route (tower transcript Exhibit A-3 at 1832:28). Respondent answered in the affirmative ("Probably so is that what you recommend," id. at 1832:42). Accordingly, ATC advised (at 1833:57) "when you're able . . . you can turn left and join [vector] J fifty-three [.]" Respondent acknowledged that authority and, approximately 2 and

(..continued)

> (a) When an ATC [air traffic control] clearance has been obtained, no pilot in command may deviate from that clearance, except in an emergency, unless he obtains an amended clearance.

§ 91.9 (now 91.13(a)) provided:

> No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.

[3]The Administrator has not appealed this modification of his order.

[4]Instrument Flight Rules.

1/2 minutes later (at 1836:48), asked for clearance to a higher altitude. A clearance to 20,000 feet (flight level 200) was given at 1837:46, and respondent acknowledged it immediately.

At 1840:26, ATC alerted respondent to his cleared altitude The aircraft was just short of 21,000 feet. Respondent disengaged the auto pilot[5] and took the controls. He announced his intention to descend. ATC immediately advised "Negative if you're up at twenty-two uh maintain flight level two two zero uh went through traffic at twenty-one" (1840:44). Respondent did not answer. He descended (steeply) to the originally-cleared 20,000 feet. At 1842:25, ATC directed him to climb and maintain 23,000 feet. The incident produced a conflict alert, as the Citation came within 600 vertical feet and 3.6 miles horizontal[6] of a King Air traveling at 21,000 feet.

Although respondent admitted receiving the 20,000-foot clearance, he argued that the violation should be excused because he reasonably relied on the performance of the flying copilot. According to respondent, Mr. Glista wrongly entered 22,000 feet into the altitude selector and respondent was too busy with other tasks, including the rerouting and monitoring storm activity, to monitor his copilot's performance in this regard.[7]

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[5]Although Mr. Glista could not recall whether the auto pilot was engaged, respondent testified that it was. Tr. at 160.

[6]Standard separation is 1000 feet vertical or 5 miles horizontal. Tr. at 83, 87.

[7]Mr. Glista could not himself recall who entered the altitude into the selector.

Respondent further argued, regarding his descent to 20,000 feet after being advised of the altitude deviation, that he did not interpret the ATC instruction to maintain 22,000, if there, as an instruction to ascend to that level. He believed that he took the proper action in returning to his cleared 20,000-foot altitude.

The law judge rejected all these arguments and affirmed the violations. He also, however, rebuffed the Administrator's claim that sanction should not be waived under the ASRP because respondent's descent, allegedly in violation of an instruction to maintain 22,000 feet was not inadvertent but deliberate.[8]

1. The unauthorized ascent. We have summarized the reasonable reliance defense as follows:

> As a general rule, the pilot-in-command is responsible for the overall safe operation of the aircraft. If, however, a particular task is the responsibility of another, if the PIC has no independent obligation (e.g., based on operating procedures or manuals) or ability to ascertain the information, and if the captain has no reason to question the other's performance, then and only then will no violation be found.

Administrator v. Fay & Takacs, NTSB Order EA-3501 (1992) at 9. Here, respondent admitted both that he heard the clearance as 20,000 and that he was responsible for setting the altitude in the auto pilot's altitude selector. Tr. at 160, 201. In fact,

[8]The complaint had incorrectly identified the aircraft as a civil aircraft. The law judge refused to allow the Administrator to correct the complaint at the hearing, Tr. at 6-11, but he ultimately found these Part 91 rules applicable to respondent regardless of the type of aircraft. He also found, incorrecctly, that the aircraft was a civil aircraft. This error was harmless. See footnote 12, supra, and accompanying text.

he testified that he twice before told the copilot, after Mr. Glista set the altitude selector, that it was respondent's job to do it. Id. Moreover, respondent as the PIC, and even more so during this proficiency flight, had the obligation to monitor the performance of the flying pilot.[9]

Respondent knew the cleared altitude and agreed he had an altimeter and altitude selector to monitor as part of his cross-check. Tr. at 193, 200. His other duties were not so great that he could ignore such a fundamental matter as the aircraft's altitude. Indeed, respondent was not directed to change his route at a particular time; he was invited to do so when able. Fully 4 minutes later, he asked for and was given a higher altitude clearance. Respondent controlled the timing of these events.[10] Substantial time passed. The deviation was not caught by ATC until almost 3 minutes later, almost 7 minutes from the authorized heading change. On this record, we decline to find that other duties "were so extensive or more significant than such a fundamental matter as altitude clearance might be

[9]Assuming the truth of respondent's testimony that Mr. Glista had correctly set the altitude selector twice previously on this flight does not authorize an assumption by respondent that Mr. Glista will do it correctly the third time. Administrator v. Heidenberger, NTSB Order EA-3759 (1993) at 7.

[10]We are not persuaded by respondent's claim that ATC contributed to the violation because it failed to give respondent a heading to intercept the J53 vector. We see no ATC culpability. Moreover, respondent did not ask for an intercept heading, the course change was not a difficult one (respondent having been given leeway to turn to the left when he was able, whereupon he would intercept the vector), and respondent could have delayed asking for a higher altitude if he needed more time for the course change.

justifiably ignored, especially during ascent and descent." Administrator v. Frederick and Ferkin, NTSB Order EA-3600 (1992) at 6-7.

Respondent has not convinced us that, in all the time available, he did not have 1 second to check the altitude selector for accuracy with the clearance he received or to check the altimeter itself. Accord Administrator v. Baughman, NTSB Order EA-3563 (1992). See also Heidenberger, supra, and Administrator v. Gentile, 6 NTSB 60, 66 (1988). Even if respondent is not held to the highest duty of care (see Appeal at 13), respondent did not satisfy the duties of a reasonable and prudent pilot when he assumed that the copilot would correctly enter the cleared altitude. Respondent testified that he was not even sure that the copilot had heard or had correctly heard that altitude.[11]

2. The descent. We agree with the Administrator that respondent reads too much into the law judge's finding. The law judge did not find that respondent deviated from an ATC instruction to maintain flight level 220. Appeal at 15. The law judge found:

> N4 descended without first responding to an Air Traffic Control instruction to maintain flight level two two zero if there, and without determining from Air Traffic Control if it would be safe to descend, and in doing so, the respondent did descend through flight level two one zero, which my determination is, was not a non-prudent violation of the standard of care afforded to the respondent in this case.

[11] See Tr. at 203.

Tr. at 243. These are findings of fact, not conclusions of law. And, they are facts that are unrebutted in the record. Respondent did not answer ATC's instruction to maintain 220 if there. Setting aside the question of whether he had an obligation to do so, respondent did not determine from ATC whether it would be safe to descend, and he did descend below 21,000 feet. And, we need not decide whether the law judge impliedly found or could, on this record, have found that the descent violated § 91.75(a). The earlier altitude deviation supports the charge and, since sanction has been waived, we need not determine whether a second count was required to justify the suspension period sought in the complaint.

3. The status of the aircraft. The complaint stated that the Citation was a civil aircraft. At the hearing, as noted earlier, the Administrator sought but was denied permission to amend the complaint to remove the "civil" reference. Although respondent admitted the aircraft was not a civil aircraft (Tr. at 11), he argues that, because the complaint was not amended to remove the allegation and because the Administrator did not prove that the aircraft was a civil aircraft, the complaint must be dismissed.

We can take official notice that this aircraft is a public, not a civil, aircraft.[12] But more important, and as the law

[12]"Public aircraft" is defined at 14 C.F.R. 1.1 as "aircraft used only in the service of a government, or a political subdivision. It does not include any government-owned aircraft engaged in carrying persons or property for commercial purposes." Citation N4 was owned and operated by the FAA and otherwise met

judge noted, the difference is not pertinent. Whether the aircraft was public or civil is immaterial; both § 91.9 and § 91.75 address respondent's behavior without regard to what type of aircraft he operates. It was harmless error for the law judge to find that N4 was a civil aircraft, especially in light of the contrary discussion at the hearing (Tr. at 6-11, 239) and we so modify his decision. Galloway v. FAA and NTSB, No. 90-5640 (11th Cir., September 4, 1991, unpublished) is inapposite, as its facts are entirely different. There, the applicability of the cited rule depended on a finding that a civil aircraft was involved.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied; and

2. The initial decision is affirmed, as modified here.

VOGT, Chairman, COUGHLIN, Vice Chairman, LAUBER, HAMMERSCHMIDT, and HALL, Members of the Board, concurred in the above opinion and order.

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this test.